UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALAN SCOTT ANDRE, Petitioner, v. DOUG WADDINGTON, Respondent.	CASE NO.: C06-0503-JCC REPORT AND RECOMMENDATION

Petitioner Alan Scott Andre proceeds *pro se* in this 28 U.S.C. § 2254 habeas action. (Dkt. 5.) He is in custody pursuant to a 2002 conviction by jury verdict of three counts of Child Molestation in the First Degree. (Dkt. 19, Ex. 1.) Petitioner raises eight grounds for relief in his habeas petition. (Dkt. 5.) Respondent filed an answer to the petition with relevant portions of the state court record. (Dkts. 17 & 19.) Respondent argues that petitioner failed to properly exhaust five of his grounds for relief and that the three exhausted claims lack merit. (Dkts. 17 & 25.) Petitioner concedes that he failed to exhaust two of his claims, but maintains the exhaustion and merit of his remaining claims. (Dkt. 24.) The Court has considered the record relevant to the grounds raised in the petition, including all hearing transcripts. For the reasons discussed herein, it is recommended that petitioner's habeas petition be denied and this action dismissed.

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I

The Washington Court of Appeals summarized the facts surrounding petitioner's conviction as follows:

> Gina and Greg Levinson have two young daughters, H.L. and C.L. Gina and Greg separated in 1995 and their divorce became final in 1998. After they separated, Greg began dating and eventually married Lori Levinson. H.L. and C.L. lived with their mother but spent every other weekend and two months in the summer with their father.
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> Alan Andre and Gina met and began dating in 1997. They lived together in Renton and soon thereafter had a son. Between 1997 and 1999, Andre, Gina, and the three children moved to Oregon, Chicago, and Indiana because of Andre's employment. In the summer of 1999, Andre and Gina separated and Gina and the children moved back to Washington. About a year later, the couple reconciled and Andre moved in with Gina and the children on Mercer Island.
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> On a Sunday afternoon in April 2001, when H.L. was eleven years old, she told her stepsister, and then her father and Lori, that Andre had inappropriately touched her.
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> A couple of days later, H.L. disclosed what had happened to her school counselor. She told the counselor that Andre would rub her back and snuggle with her at night and then he would touch her "private." The counselor called Gina and Child Protective Services (CPS).
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> Mercer Island Police Detective Meta Barden investigated H.L.'s allegations. Detective Barden, together with a CPS caseworker, interviewed H.L. at school.
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> A few days later, Andre agreed to meet with Detective Barden and discuss H.L.'s allegations. During the two-hour taped interview, Andre denied molesting H.L. but acknowledged that he had probably inadvertently touched her breasts and buttocks when he was with her at bedtime. He said that H.L. had Attention Deficit Disorder (ADD) and the medication she took caused her to have trouble falling asleep. Because of this, she often asked him to rub her back at night. He also said that at one point H.L. asked that he not lay so close to her. He was not sure why she made this request and said he tried from then on to stay further away from her body when he was with her at bedtime.
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> The State charged Andre with three counts of first degree child molestation alleging that Andre molested H.L. three times during the six month period between

September 2000 and February 2001 when Andre lived with Gina and the children on Mercer Island.

At trial, H.L. testified that Andre repeatedly touched her on her breasts, buttocks and vaginal area during a three-year period. She said that on one occasion she asked him to stop and he complied for awhile. H.L. also acknowledged that when she was six-years old and her father and Lori were first dating, she reported that Lori had inappropriately touched her. She later admitted that she made up these allegations because at the time she did not like Lori and did not want her father and Lori to be together.

At trial, Andre argued H.L. made up the allegations against him with the same motive as when she made up allegations against Lori in 1997. His defense also focused on the inconsistencies between H.L.'s testimony at trial and the statements she previously gave to the school counselor and Detective Barden.

The jury convicted Andre of first degree child molestation on all three counts. Andre requested a sex offender alternative sentence. The court denied his request and imposed a high end standard range sentence of 130 months on each count to run concurrently.

Andre filed a motion for a new trial based on juror misconduct alleging the jury had improperly considered extrinsic information about H.L.'s ADD. The court held a hearing on Andre's motion and several jurors testified. The trial court decided the jury did not impermissibly rely on extrinsic evidence and entered written findings of fact and conclusions of law denying the motion for a new trial. . . .

(Dkt. 19, Ex. 2 at 1-4 (footnotes omitted.))

Petitioner appealed his conviction to the Washington Court of Appeals. (*Id.*, Ex. 3.) His counsel raised the following grounds for review:

1. Prior to trial, appellant was interviewed by a police detective. During the interview, appellant made numerous inculpatory and exculpatory statements. The state sought to, and did, introduce at trial numerous sections of the interview transcript. Due to the amount of the transcript admitted by the state, appellant sought to introduce the entire transcript of the interview. After being refused the entire transcript by the court, appellant sought to admit additional transcript sections to explain those introduced by the state. While the court admitted some of these additional portions, it refused many others. Significant refused portions contained exculpatory statements.

Did the trial court err by not admitting the entire interview transcript where the remainder of the transcript would have explained or clarified the parts admitted by the state, and where the transcript contained exculpatory statements which were not introduced? In the alternative, did the trial court err by refusing to admit sections of the transcript specifically requested by appellant to explain or clarify sections already admitted by the state?

2. The state called Diana Low, who had been the alleged victim's fifth-grade teacher for only four months. She was unaware of the alleged victim's reputation in the school and, based on the fact that no one had complained to her about the alleged victim lying, testified that she believed the alleged victim had a good reputation for honesty. Did the trial court err when it allowed Low to testify to the alleged victim's reputation when she admitted she was unaware of that reputation?

3. The alleged victim had made a prior allegation of the same nature against a different person, Lori Levinson, which the alleged victim admitted was false. The prosecutor's opening statement told the jury Levinson now believed that the alleged victim was telling the truth in this instance and was going to testify on her behalf. Additionally, during rebuttal closing argument, the prosecutor implied that defense counsel was bullying a child witness. Did the trial court err by not granting appellant a new trial based on prosecutorial misconduct?

4. The alleged victim suffered from Attention Deficit/Hyperactivity Disorder (ADD). While on the witness stand, the alleged victim was confronted with several inconsistent statements she had made, which she had difficulty explaining. After the verdict, several jurors testified that they considered the alleged victim's ADD when analyzing her difficulty answering questions and when determining her credibility. In addition, several jurors informed the other jurors of extrinsic evidence pertaining to ADD, which the defense had no chance to hear or rebut. Did the trial court err by denying appellant's new trial motion based on juror misconduct?

(*Id*. at 2-3.) He also argued that cumulative error in the trial required reversal. (*Id*. at 48-50.)

The Washington Court of Appeals affirmed the conviction. (*Id*., Ex. 2.) Petitioner petitioned for review *pro se*, raising the following issues:

1. Interview Transcript

In Brady v. Maryland, 373 U.S. 83, 87, 83, S. Ct. 1194, 10 L.Ed.2d 215, the court held that suppression of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or punishment.

In this case only about 11 pages of a 72-page transcript were admitted into evidence. The trial court abused its discretion in not admitting enough of the transcript that included exculpatory statements. Andre attempted to admit the tape itself, because the context of any statements construed to be inculpatory would be explained and Andre's truthfulness would have been determined based upon his tone of voice and inflections. This refusal violates the "rule of completeness" and gives a distorted meaning of the statements made, causing prejudice.

The United States Supreme Court recently ruled that police cannot extract information from suspects and only then inform them of their rights. Andre was not read his rights prior to questioning and therefore the transcript may not be admitted at all.

2. Reputation Testimony

State v. Lord, 117 Wn. 2d 829, 873, 822, P.2d 177 (1991) (Quoting 5A Karl B. Tegland, Wash. Prac. Evidence , §231 at 201-04 (3d ed. 1989)) outlined the requirements for reputation testimony to be admitted.

Andre contends that the trial court erred in its allowing reputation testimony based on its definition of a community and the Court of Appeals erred in its decision upholding the trial court.

3. Prosecutorial Misconduct

In State v. Case, 49 Wn. 2d 66, 70-71, 298 P.2d 500 (1956), the court held that a prosecutor must seek "no conviction through the aid of passion, sympathy or resentment."

Andre contends that the prosecutor's remarks in opening and closing arguments constituted prosecutorial misconduct, the trial court should have declared a mistrial, and the Court of Appeals erred in its ruling upholding the trial court.

4. Juror Misconduct

In State v. Briggs, 55 Wn. App. 44, 59, 776 P.2d 1347 (1989) the Court held that a jury is expected to bring opinions, insight, common sense and everyday experience to deliberations, but evidence outside a typical juror's general experience should not be introduced. Accordingly, the interjection of extrinsic evidence into deliberations violates this principle as well as violates the accused's right to due process. U.S. Const. Amend. 14, Const. Article 1, §3. Thus, a juror introducing extrinsic evidence constitutes misconduct.

> Andre contends that juror comments made regarding [H.L.'s] attention deficit disorder (ADD) were extrinsic evidence and not personal life experience and the trial court erred in not declaring a mistrial when the evidence was discovered.
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> **5. Cumulative Error**
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> The combined effects of errors may require a new trial even where no single error warrants reversal. State v. Coe, 101 Wn. 2d 772, 789, 684 P.2d 699 (1984) and State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn. 2d 1019.
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> Andre contends that the cumulative errors of (1) the court's refusal to admit the entire transcript of Andre's interview with Mercer Island Detective Metta Barden (Barden); (2) improper reputation testimony; (3) the prosecutorial misconduct; and, (4) juror misconduct warrant a new trial.
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> **6. The Verdict is Contrary to the Law and Evidence**
>
> A charge of child molestation can only be proved if sexual gratification is proved. State v. Jones, 71 Wn. App. 798, 825-26, 863 P.2d 85 (1993). The state offered no evidence even suggesting sexual gratification.

(*Id*., Ex. 5 at 1-4.) The Washington Supreme Court denied the petition for review without discussion. (*Id*., Ex. 6.) The Washington Court of Appeals issued its mandate on April 8, 2005. (*Id*., Ex. 7.)

Again proceeding *pro se*, petitioner filed a personal restraint petition in the Washington Court of Appeals, raising three claims: (1) failure to give *Miranda* warnings during custodial questioning; (2) insufficient evidence to convict; and (3) prosecutorial misconduct through overcharging during trial and before jury deliberation. (*Id*., Ex. 8.) The Washington Court of Appeals dismissed the petition. (*Id*., Ex. 11.) Raising the same issues, petitioner filed a motion for discretionary review with the Washington Supreme Court. (*Id*., Ex. 12.) The Commissioner of the Supreme Court denied review and the Washington Court of Appeals issued its certificate of finality on April 25, 2006. (*Id*., Exs. 13 & 14.)

II

Petitioner now raises the following grounds for relief:

1. Mercer Island police violated my right of self incrimination. (Failure to give *Miranda* warning).

2. The evidence presented at trial does not meet the criteria of the law. (Insufficient evidence to convict).

3. Prosecution abused discretion by adding multiple charges. (Overcharging).

4. The trial court erred by not allowing the entire transcript of my interview with Detective Barden.

5. The trial court erred in allowing Diana Law to testify to H.L.'s reputation at the school.

6. Prosecutorial misconduct deprived me of a fair trial. (Opening and closing statements).

7. Juror misconduct deprived me of a fair trial. (Discussion of extrinsic evidence of ADD by the jury).

8. Cumulative error.

(Dkt. 5 at 6-12.)

Respondent asserts that petitioner failed to properly exhaust his third, fourth, fifth, sixth, and eighth claims, and that these claims are now procedurally barred. Respondent further argues that petitioner's first, second, and seventh claims fail on the merits. Petitioner concedes that he failed to exhaust his third and fifth claims, but maintains he properly exhausted his remaining claims. The Court addresses respondent's exhaustion argument first.

III

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has

exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," and, therefore, requires "state prisoners [to] give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

A complete round of the state's established review process includes presentation of a petitioner's claims to the state's highest court. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994). However, "[s]ubmitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). Consequently, presentation of a federal claim for the first time to a state's highest court on discretionary review does not satisfy the exhaustion requirement. *Castille*, 489 U.S. at 351; *Casey v. Moore*, 386 F.3d 896, 915-18 (9th Cir. 2004), *cert. denied* 125 S.Ct. 2975 (2005). *But see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.")

Additionally, a petitioner must "alert the state courts to the fact that he was asserting a claim under the United States Constitution." *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). "The mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Id.* (citing *Duncan*, 513 U.S. at 366). "Moreover, general appeals to broad constitutional principles, such as due process,

equal protection, and the right to a fair trial, are insufficient to establish exhaustion." *Id.* (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than a year after the judgment becomes final. Additionally, if the state court expressly declined to consider the merits of a claim based on an independent and adequate state procedural rule, or if an unexhausted claim would now be barred from consideration by the state court based on such a rule, a petitioner must demonstrate a fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

In this case, because petitioner concedes his failure to exhaust his third and fifth grounds for relief, the Court need only address whether petitioner properly exhausted his fourth, sixth, and eighth grounds for relief. For the reasons described below, the Court agrees with respondent that petitioner failed to properly exhaust these claims.

Petitioner's fourth ground for relief asserts error in the trial court's refusal to admit the entire transcript of his interview with Detective Barden. In the Washington Court of Appeals, petitioner argued that this refusal violated the evidentiary "rule of completeness" and referenced the effect of the admission of an incomplete statement on the Fifth Amendment right not to testify. (Dkt. 19, Ex. 3 at 17-30.) In the Washington Supreme Court, petitioner again asserted a violation of the rule of completeness and asserted arguments as to *Brady* and *Miranda* violations. (*Id.*, Ex. 5 at 6-7) (referring to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Miranda v. Arizona*, 384 U.S. 436 (1966)). Here, petitioner asserts a violation of the rule of completeness – an evidentiary rule,

not a federal constitutional claim – and the resulting denial of a fair trial – a Fourteenth Amendment due process claim. Because petitioner failed to present this due process claim in either the Washington Court of Appeals or the Washington Supreme Court, and because he failed to exhaust any of the constitutional claims raised in the state courts by failing to complete one round of the state's appellate review process with respect to each of those claims, petitioner's fourth ground for relief is unexhausted and now procedurally barred.

In his sixth ground for relief, petitioner asserts prosecutorial misconduct in opening and closing statements. Although petitioner presented this argument as a federal constitutional violation in the Washington Court of Appeals, he failed to do so in the Washington Supreme Court. (*See* Dkt. 19, Ex. 3 at 35-41 & Ex. 5 at 9-10.) It is not enough to state, as asserted by petitioner here, that this claim was implied in his petition for review in the Washington Supreme Court. *See generally Hiivala*, 195 F.3d at 1106 (petitioner must "alert the state courts to the fact that he was asserting a claim under the United States Constitution.") Nor do the cases cited by petitioner in support of this proposition apply in this case. *See, e.g., Beam v. Paskett*, 3 F.3d 1301, 1305-1307 (9th Cir. 1993) (discussing state mandatory review provisions for death penalty cases which require states to review for specific types of errors and where a finding of no error therefore constitutes state consideration and implied exhaustion), *overruled in part on other grounds by Lambright v. Stewart*, 191 F.3d 1181, 1186 -87 (9th Cir.1999). As such, petitioner's sixth ground for relief is unexhausted and now procedurally barred.

Petitioner's eighth ground for relief asserts cumulative error. However, petitioner failed to raise this claim as a federal constitutional violation in either the Washington Court of Appeals or the Washington Supreme Court. (*See* Dkt. 19, Ex. 3 at 48-50 & Ex. 5 at 13-14.) Petitioner's

general assertion in his state court briefing that the cumulative error deprived him of his right to a fair trial does not suffice to establish exhaustion. *See Hiivala*, 195 F.3d at 1106 ("Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.") Nor, for the reasons described above, can petitioner assert implied exhaustion of this claim. Accordingly, petitioner's eighth ground for relief is unexhausted and now procedurally barred.

In sum, petitioner failed to exhaust his third, fourth, fifth, sixth, and eighth grounds for relief, and fails to demonstrate either cause or prejudice excusing his procedural default. Having considered the issue of exhaustion, the Court directs its attention to the merits of petitioner's exhausted claims.

IV

This Court's review of the merits of petitioner's claims is governed by 28 U.S.C. § 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a petitioner demonstrates that he is in custody in violation of federal law and that the highest state court decision rejecting his grounds was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state court decision will provide the "definitive source of clearly established federal law[.]" *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003). A state-court decision is contrary to clearly established precedent if it "'applies a rule that contradicts the governing law set forth in'" a Supreme Court decision, or "'confronts a set of facts that are materially indistinguishable'" from such a decision

and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

Ground One

In his first ground for relief, petitioner argues that the Mercer Island police violated his right against self-incrimination by failing to give him *Miranda* warnings. *See Miranda*, 384 U.S. at 479 (requiring police to advise suspects that they have the right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney during questioning.) "*Miranda* warnings are due only when a suspect interrogated by the police is 'in custody.'" *Thompson v. Keohane*, 516 U.S. 99, 101 (1995). Petitioner argues that he was in custody at the time of his statements to Detective Barden.

The trial court held a hearing on the admissibility of petitioner's statements to the police. (*See* Dkt. 19, Ex. 15 at 42-95.) Detective Barden testified that petitioner was not in custody at the time of the interview, that she told petitioner he did not have to talk to her and was free to leave, and that, until the conclusion of the interview, no decision had been made to place petitioner under arrest. (*Id*. at 50, 54-55, 82.) The court rejected petitioner's motion to suppress his statements, concluding he was not in custody, was free to leave, and knowingly and intelligently spoke to Detective Barden. (Dkt. 19, Ex. 9 at Appx. C.)

In considering petitioner's *Miranda* argument, the Washington Court of Appeals held as follows:

> Andre first argues that the trial court should have suppressed the statement he gave to Detective Barden because she did not warn him of his rights under Miranda v. Arizona before she questioned him.
>
> A Miranda warning is intended to protect a defendant's right not to make

> incriminating statements while in the coercive environment of police custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). The safeguards apply in circumstances where there is a possibility of coercion. See State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (focus is on the possibility of coercion, not whether an officer had probable cause to arrest). A suspect's freedom of action must be so limited to a degree associated with formal arrest. Harris, 106 Wn.2d at 789.
>
> Whether a Miranda warning was warranted is determined from the perspective of a reasonable man in the suspect's position. Short, 113 Wn.2d at 41. The sole inquiry is whether the suspect reasonably supposed his freedom of action was curtailed. If a defendant not yet charged with a crime voluntarily cooperates with questioning as part of a routine, general investigation, a Miranda warning is not required. Id.
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> The situation here did not warrant a Miranda warning. The following facts were undisputed and are verities. See State v. Lopez, 152 Wn.2d 22, 30, 93 P.2d 133 (2004) (unchallenged findings of fact entered after a suppression hearing are treated as verities on appeal). Andre went to the Mercer Island Police Department voluntarily. He knew he was there to discuss H.L.'s allegations and agreed to allow his statement to be recorded. The door to the room where he was interviewed was closed but not locked. Andre was free to leave during the interview.[1]
>
> A reasonable person in Andre's position would not suppose that his freedom of action was curtailed to the same degree as a formal arrest. The omission of a Miranda warning does not entitle Andre to relief.

(Dkt. 19, Ex. 11 at 4-5 (one footnoted citation omitted.))

Petitioner here maintains he was never told he was allowed to leave his interview with Detective Barden, which took place in a closed room with two detectives present. He notes that she failed to include this information in the tape of the interview. Petitioner argues that, given the circumstances of the interview, a reasonable person would not have believed himself free to leave. He adds that, during arguments on this issue prior to trial, the prosecuting attorney admitted petitioner was in custody in stating ". . . it was clear that we are not talking about an interrogation

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[1] [State court's footnote] Andre now claims that he was never told that he was free to leave at any time, but he did not challenge the trial court's finding to that effect.

in the custodial sense, we are talking about a custodial interview." (Dkt. 19, Ex. 15, Vol. I, Jan. 9, 2002 transcript at 89-90.) However, for the reasons described below, petitioner's arguments fail.

Under the Antiterrorism and Effective Death Penalty Act of 1996, state court findings of fact are presumptively correct in federal habeas proceedings, and the petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Here, the state court's finding that petitioner was free to leave the interview is presumed correct and petitioner fails to present clear and convincing evidence to rebut that presumption. Instead, his arguments are no more than conclusory.

Petitioner also otherwise fails to demonstrate that he is in custody in violation of federal law and that the state court decisions were contrary to, or involved an unreasonable application of, clearly established federal law. A determination of whether an individual is in custody "depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). "The only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). In this case, as found by the Washington Court of Appeals, *Miranda* warnings were not necessary where petitioner voluntarily came to the station to discuss the allegations against him, agreed to allow his statement to be recorded, was not in a locked room, and was told he was free to leave. *See, e.g., California v. Beheler*, 463 U.S. 1121, 1121-22, 1125 (1983) (*Miranda* warnings not required when suspect was not placed under arrest, voluntarily came to station, and was allowed to leave unhindered after brief interview); *United States v. Norris*, 428 F.3d 907, 912 (9th Cir.

2005) (defendant was not in custody for purposes of *Miranda* where he voluntarily accompanied officers to the station, was told he was free to terminate the interview at any time and was not under arrest, was never restrained in any way, and was taken home by the officers at the completion of the interview).

Finally, petitioner takes out of context and misconstrues the statement made by the prosecutor. In fact, in making the statement excerpted by petitioner here, the prosecutor was arguing that petitioner was not in custody at the time of his statements to the police. (*See* Dkt. 19, Ex. 15, Vol. I, Jan. 9, 2002 transcript at 89.)

In sum, petitioner fails to establish that, given the absence of *Miranda* warnings, he is in custody in violation of federal law and that the state court decisions were either contrary to, or involved an unreasonable application of, clearly established federal law. As such, his first ground for habeas relief should be denied.

Ground Two

In his second ground for relief, petitioner asserts insufficient evidence at trial to prove he touched the victim in this case for the purpose of sexual gratification. He avers that there was, in fact, no such evidence presented at trial. However, for the reasons described below, the Court concludes that this claim lacks merit.

In reviewing an insufficiency of the evidence claim, the Court must "view the record as a whole in the light most favorable to the prosecution." *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990). The question is "whether ' *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court affords significant deference to the trier of fact *Wright v. West*, 505

U.S. 277, 296 (1992).

In considering this issue, the Washington Court of Appeals held as follows:

> Andre contends that the evidence was not sufficient to convict him of first degree child molestation. He claims the State failed to prove that he touched H.L. for the purpose of gratifying his (or H.L.'s) sexual desire.
>
> The test for determining whether evidence is sufficient to support a conviction is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). By claiming the evidence was insufficient, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. Tilton, 149 Wn.2d at 786. Circumstantial evidence is as reliable as direct evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).
>
> Andre was found guilty of first degree child molestation, in violation of RCW 9A.44.083:
>
> > A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
>
> "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). A jury may infer that touching was for the purpose of sexual gratification if an adult male is proven to have touched the sexual or intimate parts of a young girl unrelated to him and for whom he is not performing a caretaking function." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986).
>
> H.L. testified that Andre sometimes lay down with her when he tucked her in at night. He rubbed her back to help her fall asleep, which was okay with her, but he also touched her on her breasts, butt, and between her legs. He touched her in each place both over and under her clothes. Andre also made H.L. touch his penis. He rubbed against her with his penis in a movement she described as "humping." H.L. said it happened almost every night.
>
> Andre is not related to H.L. and was not performing a caretaking function when he touched her on her sexual parts. Furthermore, the frequency of the contacts belies his assertion that he touched her on those parts inadvertently. See State v.

> Whisenhunt, 96 Wn. App. 18, 980 P.2d 232 (1999) (judge could reasonably infer that defendant acted for the purpose of sexual gratification when he reached his arm over the seat of a bus and touched her in the vaginal area on three separate occasions). The evidence was sufficient to support Andre's convictions.

(Dkt. 19, Ex. 11 at 5-7.)

As described by the Washington Court of Appeals, the "sexual contact" required for a charge of child molestation in the first degree includes "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." RCW 9A.44.010(2) and 9A.44.083. Here, the evidence as described by the state court belies petitioner's contention that there was no evidence presented at trial to prove that he touched the victim in this case for the purpose of sexual gratification. Further, viewing that evidence in the light most favorable to the prosecution, the Court stands assured that a rational trier of fact could conclude beyond a reasonable doubt that petitioner's actions were committed for the purpose of sexual gratification. Accordingly, petitioner's second ground for relief should be denied.

Ground Seven

In his seventh ground for relief, petitioner argues that juror misconduct deprived him of his Fourteenth Amendment due process right to a fair trial. Petitioner asserts that the victim's credibility was a key issue in this case, pointing to her previous false allegations against Lori Levinson and stating that she raised new allegations for the first time at trial and that her testimony conflicted with her pre-trial statements. Petitioner asserts that, in an effort to minimize these concerns, several jurors made comments regarding the victim's ADD. He maintains that these comments constituted extrinsic evidence jeopardizing his right to a fair trial. However, again, the Court concludes that this ground for relief lacks merit.

Jurors have a duty to consider during their deliberations only that evidence presented to them in open court. *United States v. Navarro-Garcia* , 926 F.2d 818, 821 (9th Cir. 1991). "Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed 'extrinsic.'" *Id.* "'The jury's consideration of extraneous information deprives defendants of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction.'" *Id.* at 823 (quoting *United States v. Bagnariol*, 665 F.2d 877, 884 n.3 (9th Cir. 1981)). However, a petitioner is entitled to a new trial only where there existed a reasonable possibility that the extrinsic material contributed to the verdict. *See United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002). "[T]he presence of a single improperly influenced juror" supports the existence of such a possibility. *Rodriguez v. Marshall*, 125 F.3d 739, 745 (9th Cir. 1997), *overruled in part on other grounds by Payton v. Woodford*, 346 F.3d 1204 (2003). "[G]reat weight [is placed] on the nature of the extraneous information. . . . Juror misconduct which warrants relief generally relates 'directly to a material aspect of the case.'" *Id.* at 744 (quoted and cited cases omitted).

In this case, petitioner moved for a new trial based on jury misconduct after an investigator he hired gathered information regarding the jury's consideration of evidence related to ADD. The trial court held a hearing, taking the testimony of several jurors. (Dkt. 19, Ex. 15 Vol. VI, March 8, 2002 transcript at 752-81, and April 5, 2002 transcript at 790-818.) As described by the Washington Court of Appeals, three out of the five jurors from whom testimony was taken testified as follows:

> Juror Reinhart Schaefer testified that he worked with someone for about 17

> years whose son had ADD.[2] During deliberations, he told the jury that his co-worker described his son as "literal-minded" and said he "needed to have exact questions put to him." Schaefer said this came up in the context of talking about a "difficult question by the defense attorney to the girl." He also said that during deliberations there was "not a lot of concentration on ADD."
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> Juror Kimberly Thomas, a school teacher, said the issue of ADD came up in the context of discussing H.L.'s "credibility." She said ADD was an "element" of that credibility, in addition to H.L.'s age and the pressure of testifying. Thomas said she had no expertise in ADD, it was her first year of teaching, and she had no experience teaching children with ADD. Thomas told the jury that another teacher who suffered from ADD told her "how seemingly innocuous things to us could be a distraction such that a person with ADD could not focus on anything but that distraction."
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> Juror Phillip McBeth testified that during deliberations some jurors related their experiences with ADD including the fact that children with ADD may need to have "repeated" and "specific" instructions.

(*Id*., Ex. 3 at 14-16 (footnotes with citations to record omitted.)) A fourth juror testified that three out of her twelve grandchildren have ADD, that she did not share any of her experiences with these grandchildren with the jury or participate in any jury discussions concerning ADD, and that she only remembered one juror mentioning having some experience with ADD, but not saying anything particularly significant. (Dkt. 19, Ex. 15, Vol VI, March 8, 2002 transcript at 764-72.) The fifth juror testified that ADD was discussed as one of several factors relevant to a determination of the victim's credibility, particularly as it related to the victim's difficulty in answering questions posed by the attorneys in this case. (*Id*. at 773-81.) She added that, while she has a daughter with a learning disability, she did not believe she brought that fact up in the discussion, and that she did not recall any other jurors making any pivotal contributions to the

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[2] [State court footnote] He and his coworker had about a dozen conversations about his son's condition over the years.

discussion as to their knowledge of or personal experiences with ADD. (*Id*.)

The trial court heard oral argument from the parties and denied petitioner's motion for a new trial upon concluding that the jurors had not impermissibly relied on extrinsic evidence as to ADD. (*See* Dkt. 19, Ex. 15, Supp. Rep't of Proceedings, April 19, 2002 transcript at 61-91.) As described by the Washington Court of Appeals, the trial court reasoned as follows:

> In denying Andre's motion for a mistrial, the court found that the jurors' comments did not represent specialized knowledge, but rather were the type of "comments and information that we expect them to bring to jury service." The court pointed out that ADD is a "common diagnosis" and therefore any jury is likely to contain jurors with direct or indirect experience with it. The court also concluded that even if the information considered by the jury was extrinsic evidence, it did not affect the verdict. The court noted that the crux of the case was whether the jury believed H.L., not ADD.

(*Id*. at 16.) The Washington Court of Appeals upheld the trial court's ruling on appeal:

> Andre relies on and analogizes to Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973), and State v. Briggs, 55 Wn. App. 44, 59, 776 P.2d 1347 (1989). In Halverson, a minor who was injured in a car accident brought an action claiming future wage loss. At trial, the minor testified that he wanted to be an airline pilot, but because of his injuries, decided to pursue a career as a surveyor. The jury did not have evidence of wages for pilots or surveyors. During deliberations, a juror told the others what the salaries were for airline pilots and surveyors. The Supreme Court affirmed the trial court's order for a new trial because the wage information introduced into deliberations was akin to expert testimony and should have been subject to objection, cross examination, explanation and rebuttal. Halverson, 82 Wn.2d at 747.
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> In Briggs, the central issue at trial was whether the defendant, who had a profound stutter, could control or refrain from stuttering. In voir dire, a juror intentionally withheld information about his speech disorder.[3] During deliberations, the juror discussed his own history and knowledge of speech disorders. This court held that the information imparted by the juror was outside the realm of common life

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[3] [State court footnote] Counsel did not question the jurors about their knowledge of or experience with ADD in this case.

> experience and the juror's misconduct required a new trial. Briggs, 55 Wn. App. at 59.
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> Unlike Halverson and Briggs, the information imparted by jurors Schaefer, Thomas and McBeth was not highly specialized, technical or specific. None of the jurors had ADD or particular knowledge about ADD. The information they had was based on their common life experience. In addition, the jurors' information was very similar to the evidence about ADD presented at trial. A Special Education teaching assistant testified that H.L.'s medication helped her to "focus" and "understand directions." She also said that young students with ADD are "easily distracted" by "sound" and "visual things." Both H.L.'s father and mother testified that her medication for ADD helped her to concentrate. And in contrast toBriggs, ADD was not the central issue in the case. As indicated by the trial court, the central issue was whether H.L. was telling the truth about her allegations against Andre. H.L.'s age, her testimony, her demeanor, her prior false allegation, and her ADD were all part of the jury's assessment of her credibility. The court did not abuse its discretion in concluding that the information shared by the jurors was not extrinsic evidence, but rather common life experience, and that there was no prejudice to Andre.[4]

(*Id*. at 16-18 (footnotes with citations to record omitted.))

As noted by the state courts and argued here by respondent, jurors are expected to rely on their personal experience and common sense in reaching a verdict. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."); *Grotemeyer v. Hickman*, 393 F.3d 871, 878-81 (9th Cir. 2004) ("The mere fact that the jury foreman brought her outside experience to bear on the case is not sufficient to make her alleged statements violate Grotemeyer's constitutional right to confrontation."; noting boilerplate jury instruction language directing jurors to draw reasonable inferences in light of their experience and common sense; "Varied juror experience is a virtue that

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[4] [State court footnote] We also conclude the jurors' statements Andre relied on inhere in the verdict. Statements reflecting the thought processes that led the jury to reach its verdict inhere in the verdict and may not be used to impeach it. Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003).

assists juries in ascertaining the truth."), *cert. denied*, 126 S.Ct. 177 (2005); *Navarro-Garcia*, 926 F.2d at 821-22 ("Inevitably, 'jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict.'") (quoting *Hard v. Burlington No. RR*, 812 F.2d 482, 486 (9th Cir. 1987)). Here, petitioner fails to demonstrate that the state courts erred in determining that the ADD information discussed by the jurors derived from common life experience and did not constitute impermissible extrinsic evidence. Moreover, as noted by the Washington Court of Appeals, the information discussed by the jurors did not substantially differ from the ADD evidence discussed at trial. (*See* Dkt. 19, Ex. 15, Vol. II, Jan. 15, 2002 transcript at 172-73, Vol. III, Jan. 16, 2002 transcript at 260-63, and Vol. V, Jan. 22, 2002 transcript at 637-39.) *Cf*. *Navarro-Garcia*, 926 F.2d at 821-22 (describing instances wherein a juror's personal experiences may constitute extrinsic evidence to include where a juror has personal knowledge regarding the parties or the issue involved in the litigation that might affect the verdict *or where the jury considers the juror's past personal experiences without any record evidence on a given fact, "as personal experiences are relevant only for purposes of interpreting the record evidence."*) (emphasis added). Finally, as found by both the trial and appellate courts, even if this information could be deemed extrinsic evidence, this Court finds significant the fact that ADD was merely one aspect of the credibility decision, rather than the central issue of the victim's credibility. *See Rodriguez*, 125 F.3d at 744.

For the reasons described above, petitioner fails to show that he is custody in violation of federal law and that state court decisions were either contrary to, or involved an unreasonable application of, clearly established federal law. Accordingly, the Court should also deny petitioner's seventh ground for relief.

V

Petitioner's habeas petition should be denied, and this action dismissed. A proposed Order of Dismissal accompanies this Report and Recommendation. No evidentiary hearing is required as the record conclusively shows that petitioner is not entitled to relief.

DATED this 6th day of March, 2007.

Mary Alice Theiler
United States Magistrate Judge